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No. 10-548

IN THE

Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC. AND
MINE RECLAMATION CORPORATION,

Petitioners,

v.

NATIONAL PARKS & CONSERVATION ASSOCIATION ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Exercising the authority delegated to it by Congress, the Department of Interior oversaw a decade of expert study and approved a land exchange with Kaiser. After a further ten years of litigation, the Ninth Circuit sustained Interior's finding that the exchange should be approved under the governing statute because it will further the public interest, including by protecting vital "threatened and endangered species." Pet. App. 22 (citing finding at Pet. App. 174-75).

The petition for certiorari demonstrated that the majority's determination to nonetheless vacate the agency's approval of the exchange and remand with orders to start all over contravenes "Congress' admonition that in reviewing agency action, 'due account shall be taken of the rule of prejudicial error.'" *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) (quoting 5 U.S.C. § 706). The opinion below, which does not contain one sentence explaining why the Secretary's approval of the land exchange might be affected by the minor errors that Judge Pregerson's majority opinion purported to find, is nothing more than "a clear exercise in blind form over substance." Pet. App. 96 (Trott, J., dissenting).[1]

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[1] Kaiser argued on appeal that any error by BLM was harmless, because "[t]he district court could not order the [agency] to conduct studies already completed to answer questions the [agency] has already answered." C.A. Br. 42 (citation omitted). Kaiser explained that "if extra-record evidence shows that an agency has rectified a NEPA violation

Because the importance of the ruling below is undeniable, and because there is no merit to respondents' attempt to reconcile the Ninth Circuit's decision with this Court's precedents and with the decisions of other circuits, certiorari should be granted.

1. Preliminarily, respondents make no effort to dispute the profound importance of the ruling below. This is not mere error correction. The Ninth Circuit's decision devastates a project that is "the *cornerstone* of a long-term plan to provide vital solid waste disposal capacity to Southern California for the next 100 years," L.A. Sanitation Br. 2 (emphasis added), and that an expert study panel found would be a "model" for projects the world over, Pet. App. 42.

Respondents seek further administrative proceedings in no small part in the hope of killing the project through endless process. Once the agency on remand prepares yet another EIS and appraisal, they want to "administratively appeal or judicially challenge [that] decision" too. NPCA Br. 23. Respondents view the ten years and $80 million the federal government and the project's private sponsors have invested, followed by another decade litigating

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after the onset of legal proceedings, that evidence is relevant to the question of whether relief should be granted." C.A. Reply Br. 30. It further maintained that the court of appeals could not properly require the agency "to prepare studies that [it] already has completed and that cannot be successfully challenged." *Id.* (citation omitted). *See also infra* (demonstrating that harmlessness of each of three supposed errors was both pressed by petitioners and passed upon by the court).

its approval, as "[r]ushing to judgment here." Charpieds Br. 36. For this Court to permit such a ruling to stand will send a stark, negative signal to other parties who would pursue major projects requiring governmental approval that are necessary to fulfill critical public needs.

"[U]nnecessarily sending [Kaiser] back to a Sisyphean hill which cannot be climbed in a lifetime," Pet. App. 43 (Trott, J., dissenting), is not a viable option. Because the region's solid-waste disposal plan requires a difficult and lengthy "transition from local urban landfills to a system of disposal that relies on remotely-located landfills accessed by rail," L.A. Sanitation Br. 4, "progress must occur *now* to secure the additional solid waste capacity needed for Los Angeles County," *id.* 6 (emphasis added). On an even more personal level, the elderly retirees whose medical care turns on the revenue generated from this environmentally and socially beneficial project "cannot wait another ten or twenty years for their benefits." VEBA Br. 3.

The recurring importance of the ruling below for still other important projects has now been confirmed. Just as *amicus* CVEP anticipated, Br. 6-7, the same attorney who represents the Charpieds respondents has sued to block a major solar initiative on the ground that it is invalid under the ruling below. *Western Watersheds Projects v. Salazar*, C.D. Cal. (complaint filed Jan. 12, 2011); *Desert Solar Projects Now Threatened By Eagle Mountain 9th Circuit Court Decision*, THE PUBLIC RECORD, at 1 (Jan. 2011).

The position of the Solicitor General – "that the court of appeals erred in remanding the case," but

that the ruling below is ultimately fact-bound, U.S. Br. 9 – is incorrect, although that is an unsurprising posture for the government to adopt. The United States cannot explicitly admit that the decision below stands as a significant obstacle to federal approvals for this and other critical projects, because – if certiorari were denied – that admission could later be quoted back against it in court. Further, because the Kaiser landfill is a state and local initiative, the Executive Branch has no overriding imperative to secure further review. The relevant point, however, is that on the merits the United States unambiguously maintains that the ruling below is erroneous.

2. The Ninth Circuit erred in invalidating the land exchange on the ground that the Yerke Appraisal fails to assess whether landfill use is the property's "highest and best use" under *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1180 (9th Cir. 2000). *See* Petrs. C.A. Br. 42 and C.A. Reply Br. 30-32 (arguing that Herzog Report made it unnecessary and improper to vacate the land exchange).

a. Preliminarily, respondents mischaracterize the case's procedural history. The Herzog Report is not part of a "new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Rather, BLM formally adopted the Herzog Report and reaffirmed the land exchange in agency action that became final when respondents did not appeal.

In 1997, when the BLM District Manager issued the initial Record of Decision (ROD) approving the Kaiser land exchange, Pet. App. E, respondents

administratively appealed and lost, Pet. App. C. After respondents filed this suit, the Ninth Circuit decided *Desert Citizens*, and respondents then raised a "highest and best use" argument for the first time. BLM responded in the only way possible: it promptly commissioned Herzog to conduct a new analysis that conformed to *Desert Citizens*. *See* Pet. App. 302-03. Of particular note, Herzog prepared BLM's response in *Desert Citizens* itself, in which the district court "found that Mr. Herzog's appraisal report cured any defects found in the original appraisal by the Ninth Circuit." Pet. App. 308.

BLM appraisals and any appeals by objectors are governed by "Section 2200.0-6 of the exchange regulations (43 CFR Part 2200)." Pet. App. 222. *See also* Pet. App. 165, 173-74. In this case, Herzog conducted a detailed analysis which concluded that landfill use was not the property's highest and best use. *See* Pet. App. 313-28. *Contra* Charpieds Br. 23. BLM's Chief State Appraiser then approved Herzog's conclusions in a lengthy report. Pet. App. J; *see* 43 C.F.R. §§ 2201.3, 2201.3-4 (requiring appraisal and appraisal review).

On that basis, the District Manager – the same official who issued the first ROD – formally determined that the original ROD's determination "that the exchange was in the public interest was well supported by the information at the time and *remains valid.*" Pet. App. 304 (emphasis added); *see also* 43 C.F.R. § 2201.7-1(a) (after appraisal, "the authorized officer shall decide whether to approve" a land exchange).

BLM then formally certified the Herzog Report, the Chief Appraiser's report, and the District

Manager's decision as part of the administrative record. Pet. App. H; *see also* U.S. Br. 6 ("BLM approved the Herzog report, formally added it as a supplement to the administrative record, and submitted it to the district court as an attachment to BLM's joint summary judgment motion with Kaiser.").

The District Manager's decision was unquestionably appealable agency action under 43 C.F.R. § 4.410(a). Respondents' contrary argument rests on the false claim – which not even the Ninth Circuit adopted – that BLM's regulations first require "public review and comment" on an appraisal and its approval. Charpieds Br. 22. The appeal regulation provided at the time (with irrelevant changes made last year) that "[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management . . . shall have a right to appeal to the Board . . . ." 43 C.F.R. § 4.410(a) (amended Nov. 18, 2010). Respondents' right (and concomitant obligation) to appeal is not actually disputable: respondents initiated this very litigation after appealing an *indistinguishable* decision – the original ROD – by the *same* BLM official. *See* Pet. App. 96 (Trott, J., dissenting).

b. Respondents equally misstate the legal basis for the Ninth Circuit's holding that it would not consider the Herzog Report as a matter of law. Judge Pregerson's opinion rested on the Ninth Circuit's settled refusal to consider "supplemental materials presented after the onset of litigation" in cases that involve challenges "to a final agency action," finding it decisive that the Herzog Report "was not before either the BLM or the Appeals board" when BLM

originally issued its 1997 ROD. Pet. App. 19 n.5. Furthermore, the Ninth Circuit refuses to consider a subsequent agency decision unless it is itself final agency action that is "*immune* to challenge." *Id.* (emphasis added).

On either of two related grounds, the Ninth Circuit's decision cannot be reconciled with decisions of this Court and circuits applying ordinary harmless error principles. *See* Pet. 25-26. First, any initial error of BLM in failing in the Yerke Appraisal to explicitly address landfill use as the property's highest and best use is harmless because BLM subsequently formally adopted the Herzog Report and respondents did not appeal. Second, even if respondents were correct that the Herzog Report is not part of the agency record on this appeal, the remand ordered by the Ninth Circuit is pointless, because the Herzog Report is not only binding as final agency action but it in any event makes clear that BLM on remand will reaffirm its initial highest and best use determination. *Cf. National Ass'n of Home Builders*, 551 U.S. at 660 n.5 (remand improper when agency specified its position "[f]ollowing the issuance of the panel's opinion").

Nor is there merit to respondents' remaining argument that *Desert Citizens* affirmatively precludes Herzog's detailed finding that landfill use is not the government property's highest and best use. The majority did *not* dispute Kaiser's showing that Herzog "did consider highest and best use, as required by our decision in *Desert Citizens*." Pet. App. 19 n.5. "[T]he court of appeals in this case did not identify anything in the administrative record underlying the agency decision under review that

indicated a likelihood that BLM would have reached the same conclusion" only *because* "the court of appeals refused to consider [the Herzog] report." U.S. Br. 10. *See also* L.A. Sanitation Br. 5 n.2 (explaining that respondents' reliance on the purchase price for the fully permitted project to suggest that BLM undervalued the government's property is grossly misleading).

The Ninth Circuit accordingly should have held that BLM's reaffirmation of the land exchange in light of the Herzog Report was binding as final agency action, or at least should have assessed respondents' highest and best use claim in light of the Herzog Report. There is no basis in law for the Ninth Circuit to vacate the land exchange and "send the case back to [BLM] to do something BLM has already adequately done." Pet. App. 36 (Trott, J., dissenting).

3. The petition established that this Court should review the Ninth Circuit's holding that a flaw in a single paragraph of BLM's 1600-page EIS required it to vacate the land exchange. Kaiser argued below that any error by BLM in formulating this one paragraph did not warrant reversal, because it is obvious from the entire record that BLM in fact "considered a wide range of alternatives," C.A. Reply Br. 35, including "evaluated waste diversion, offsite landfill locations, a landfill on other Kaiser property, and the 'landfill on Kaiser land only' alternative," C.A. Reply Br. 37. "BLM did evaluate and consider alternatives that would not use federal land for the project." C.A. Br. 46.

Respondents now echo the leap in logic of the majority below from the premise that BLM

acknowledged Kaiser's goals in one paragraph to the unsupportable conclusion that BLM must have refused on that basis to consider alternatives that would not have furthered Kaiser's goals. That makes no sense and is contrary to the record. BLM was required by law to acknowledge Kaiser's purposes; it literally had no choice. *See* Pet. 27; Pet. App. 47 (Trott, J., dissenting) (citing cases). Respondents thus fail to answer the petition's showing that the ruling below puts agencies in the impossible position of having to acknowledge the purposes of proposals of private industry, without thereby being found *ipso facto* to have capitulated to private interests. *See generally* PLF Br.

Like the majority below, respondents inexplicably treat as irrelevant BLM's detailed explanation for why it declined to pursue alternatives that would not involve some form of the land exchange. Respondents hypothesize that there might be alternatives that "benefit the public interest *more* than the proposed project," Charpieds Br. 32 – for example, because it might be true "that the public interest is better served by a different use of the targeted [governmental] lands or that Los Angeles County's interest in additional desert landfill space beyond the new Mesquite Regional Landfill can be met on other, less sensitive land," NPCA Br. 18. But BLM explained at length and in cogent detail that the alternatives to the project would fail to produce "federal acquisition and consolidation [of] environmentally sensitive lands" – *i.e.*, the Kaiser property. Pet. App. 231. The alternatives would also create greater danger for the Park, Pet. App. 230; increase air pollution, *id.*; be economically infeasible,

id.; depend on "highly volatile" alternative markets, Pet. App. 231; and create "health concerns," Pet. App. 233. To the extent that other landfills were viable, those alternatives were "not mutually exclusive" with the Kaiser project and could be pursued separately. Pet. App. 232. Respondents' further complaint that BLM also cited a goal of "*reclamation* of the Kaiser mine site,'" Charpieds Br. 36 (quoting Pet. App. 231-32), makes no sense: reclamation is obviously an important environmental goal. What respondents omit is – as Judge Trott explained – that "Kaiser's obvious *pecuniary* goals are nowhere in sight." Pet. App. 46 (emphasis added). In fact, not even the majority doubted that the entirety of the record demonstrated that the public interest drove BLM's choice of the alternatives to study – it simply refused to look beyond a single, isolated, summary paragraph.

Critically, the environmental benefits of the project are no longer disputed. Respondents thus fail to come to grips with the implications of the Ninth Circuit's explicit approval of BLM's determination that the land exchange would further the public interest. BLM specifically found after detailed study – and the majority below *accepted* – that the government would secure significant environmental benefits by acquiring Kaiser's land. The project significantly furthers environmental protection because the parcels contributed by Kaiser encompass "environmentally sensitive lands, including an area designated by the United States Fish and Wildlife Service as critical habitat for the threatened desert tortoise." U.S. Br. 4. Further, the project would "generate[] $1 per ton of waste deposited at the

landfill in support of mitigation and monitoring efforts" for "protection of more than 745,900 acres of habitat across 21 conservation areas." CVEP Br. 4.

4. Finally, the petition, at 31-32, demonstrated that the Ninth Circuit committed the same legal error in vacating the land exchange on the basis of the EIS's discussion of eutrophication. *See* Pet. App. 32. The court of appeals did not accept the district court's conclusion that the EIS's analysis of that one issue was insufficiently developed. Rather, the majority below concluded that, although the EIS did substantively address the issue of eutrophication, it was nonetheless flawed because it failed to present that analysis "up front" in a single section. Pet. App. 32. Judge Pregerson concluded that the EIS thereby violated the Ninth Circuit's rule that an EIS will be assessed not merely for its substance but also on the basis of its "form." *Id.* (Respondents thus err in attempting to suggest that the issue is not preserved for review in this Court: the Ninth Circuit itself articulated this distinct basis for invalidating the EIS and "passed upon" whether the EIS's form rendered it invalid. *Id.*)

Respondent NPCA notably does not even attempt to defend the court of appeals' holding or to deny that it conflicts with other circuits' rulings that supposed errors in the form of EISs are *not* a basis for invalidating the underlying agency action, unless it can be shown that the errors harmed the public's ability to contribute to the agency's analysis. *See* Pet. 21-24 (collecting cases). The Ninth Circuit's exclusive reliance on the "form" of an EIS stands in stark and troubling contrast to the focus of other courts of appeals on the effect of any error on the substance of

the agency's analysis. In this case, BLM's discussion of eutrophication in the EIS was extensive, and the public had the opportunity to comment not only in writing but in multiple open hearings. Judge Pregerson's opinion made no contrary claim. Vacating BLM's approval of the land exchange to require BLM to reorganize the EIS – leading only to another round of appeals – conflicts with basic principles of administrative law.

In sum, this Court should review the Ninth Circuit's determination to vacate and remand BLM's approval of the land exchange underlying project – which is absolutely critical to regional planning in Southern California – on the basis of three errors that will have no effect on the agency's decision making.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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